

1991

Board of Equalization v. Utah State Tax Commission : Brief of Appellee

Utah Supreme Court

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BRIEF

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910310

IN THE SUPREME COURT OF THE STATE OF UTAH

BOARD OF EQUALIZATION OF
SALT LAKE COUNTY, STATE OF
UTAH,

Petitioner/Appellant,

vs.

UTAH STATE TAX COMMISSION,
ex rel BENCHMARK, INC.,

Respondents/Appellees.

Case No. 91-0310

Priority 14A

BRIEF OF APPELLEE

On Appeal From The Decision Of The Utah
State Tax Commission Dated June 28, 1991

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
DETERMINATIVE STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
STATEMENT OF FACTS	3
ARGUMENT	9
CONCLUSION	11

TABLE OF AUTHORITIES

	<u>Page</u>
Federal Home Loan Bank Board Regulation R41(c)	4
<u>Rio Algom Corp. v. San Juan County</u> , 681 P.2d 184 (Utah 1984)	9
Utah Code Ann. § 59-5-4.5	9
Utah Code Ann. § 63-46(b)-16	1
Utah Code Ann. § 78-2-2(3)(e)(ii)	1
Utah Code Ann. § 63-46(b)-16(4)(d)	1

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 63-46(b)-16 and Utah Code Ann. § 78-2-2(3)(e)(ii).

ISSUES PRESENTED FOR REVIEW

Was the Utah Tax Commission's determination of the fair market value of Appellee's property supported by substantial evidence?

STANDARD OF REVIEW

The applicable standard of review in this case is whether or not the determination by the Utah Tax Commission of the fair market value of the property was supported by substantial evidence when viewed in light of the whole record before the court. Utah Code Ann. § 63-46(b)-16(4)(d).

DETERMINATIVE STATUTORY AND REGULATORY PROVISIONS

Utah Code Annotated, § 59-2-103(1):

(1) All tangible taxable property shall be assessed and taxed as a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.

Utah Code Annotated, § 59-2-102(3):

As used in this chapter and title:

* * *

(3) "Fair market value" means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts, . . ."

STATEMENT OF THE CASE

In this case, Appellant, County Board of Equalization of Salt Lake County, appeals from determination of the fair market value of Petitioner's property by the Utah Tax Commission. The property in question consists of some 44 unsold lots in developer's subdivision north of Foothill Drive in Salt Lake City. Based upon the facts before it, the Utah Tax Commission determined the fair market value of Appellee's property, using a valuation analysis that considered appropriate holding and transactional costs. This practice is consistent with other tax commission rulings, including a similar ruling with respect to Petitioner's property handed down several years ago.

SUMMARY OF THE ARGUMENT

Appellee submits that the determination of the fair market value of the property in question was adequately supported by the evidence in the record. That the Tax Commission uses different methodologies to determine the fair market value of property held by differently situated taxpayers does not demonstrate, or even suggest, that the Tax Commission has acted contrary to applicable law.

STATEMENT OF FACTS

During the hearing before the Utah Tax Commission, abundant evidence was presented to the Tax Commission that the fair market value of the property in question should be

determined by reference to its use by the owner. That meant that because the owner was a developer who developed the subdivision and was selling off the lots over a predictable period of time, appropriate holding and transactional costs should be used in determining the fair market value in that owner's hand.

Howard J. Layton, an appraiser and a member of the American Institute of Real Estate Appraisers, holding an MAI designation, (Transcript at p. 12.), testified as to his analysis of the projected rates of sale as well as his analysis of the underlying value of the parcels. His opinion as to the fair market value of the property was presented in Exhibit 2. (Transcript at pp. 15-16.) In addition to his personal experience, Mr. Layton based his opinion as to the appropriate methodology for appraising the property on portions of Federal Home Loan Bank Board regulation R41(c). (Exhibit 4, Record at p. 00050) Mr. Layton testified as follows:

"Valuations involving such property must fully reflect all appropriate deductions and discounts, as well as the anticipated cash flows to be derived from the disposition of the asset over time. Appropriate deductions and discounts are considered to be those which reflect all expenses associated with the disposition of the realty as of the date of completion as well as the cost of capital or entrepreneurial profit."

Question: "As an MAI appraiser, do you consider that following these guidelines and instructions is an appropriate method of determining the fair market value of the property?"

Answer: "I do."

Question: By fair market value, do you understand that to mean that which a willing seller and a willing buyer would agree upon as a price in the market free from constraints such as foreclosure, etc.?"

Answer: "Yes."

Transcript at p. 25.

In answer to further interrogation on cross examination, Mr. Layton testified that buyers and sellers who purchase such property in bulk for development and sale would, in fact, treat it in this fashion.

Question: "I guess what I am saying, if we put ourselves in the mind set of what we call the willing buyer and the willing seller, and were looking at a specific lot or a specific parcel of property, is this the kind of thing you would say always goes through the seller's or buyer's mind when negotiating as to what to sell or buy that particular parcel of property for?"

Answer: "I would say yes. Having been a developer of a subdivision and having to sell lots over time and realizing that income has to come in, I honestly believe that there is a difference between a retail price and the actual value if I were to step and buy Benchmark's subdivision."

Question: "You're talking, again, about the entire subdivision?"

Answer: "The entire grouping of lots."

Transcript at p. 29.

The Federal Home Loan Bank Board regulation referenced is Exhibit 4 (Record at p. 50). That reference reads in pertinent part:

"R: For subdivisions, condominiums, timeshares or any project sold off in parcels to various buyers over time, the appraiser must analyze and report the value as if the total group of parcels were sold as a bulk transaction to a single purchaser who, in turn, would sell them off over time to the ultimate buyers of each individual lot, home, condominium or timeshare unit.

1. From the summary of the individual unit value, the appraiser must make all appropriate deductions and discounts to arrive at the estimate of the value to that single buyer.
2. These discounts would include marketing and sales, seller's share of any escrow and title costs, property taxes and maintenance during the sales period, general and administrative expenses of the disposition effort, the cost of capital (both borrowed in equity), and an entrepreneurial profit to attract an investor to purchase the block of units for re-sale purposes."

Record at p. 50.

The intent of R41(c) was to instruct appraisers as to the appropriate methodology of valuing such property held in bulk.

"I think that the intent of R41(c) was to instruct appraisers to use the appropriate detail, the appropriate analysis or market evidence to come up with a conclusion, and it's been so typical in the past that lenders have only been able to review and see the sum total of the retail value, and because of the problems that lenders have had in taking over projects and then trying to sell them out on the market place to another single owner or entrepreneur, that is why R41(c) in this case and in this paragraph, it was necessary to make sure that the appraisers took into account the appropriate deductions that are necessary to entice a single buyer to purchase an investment."

Transcript at p. 30.

Another witness, Chris Goddard, who was the chief appraiser and REO manager (real estate owned) for United Savings Bank, supported the testimony of Mr. Layton. He testified that new regulations were recently handed down by the office of thrift supervision that replaced Rule 41(c). (Transcript at p. 52.) Mr. Goddard testified that the application of those regulations and procedures should be used to derive the fair market value for property held in bulk. (Transcript at p. 54.)

Further, the regulation has been adopted by FIRREA (Federal Institution Reform Recovery Enforcement Act). The regulation was set forth in pertinent part in Exhibit 5 (Record pp. 62-67). It provides, in pertinent part, that an appraiser must determine a marketing period (Record p. 66) conduct a time analysis (Record p. 66) and make appropriate deductions and discounts for holding costs, marketing costs and entrepreneurial profit. (Record at p. 67.)

The appraiser for Appellant, Mr. Daniels, agreed that as a matter of fact, lots held in the hands of a developer would require an absorption or holding period. (Transcript at p. 80.) Mr. Daniels did not employ a methodology using holding periods and transactional costs because he was instructed by Appellant not to.

Mr. Daniels further agreed that as the character of the land changes depending upon the owner of the land and his use of it, the appraiser valuation would also change. (Transcript at p.

81.) Further, the witness agreed that the absorption period of eight years, testified to by Mr. Layton, was "probably correct." (Transcript at p. 82.)

Thus, there was abundant testimony presented to the Tax Commission that the fair market value of land held by a developer for sale should be derived by considering holding periods and appropriate discounts to determine transactional costs that should be deducted in determining fair market value.

As the testimony demonstrated, one of the difficulties that lenders have encountered is that they fail to appraise the appraised property in such fashion in the past. The result of that has been that when lenders have foreclosed they have found that the appraisal value of such development property was far too high, leading to some of the financial crisis that have been so widely reported in the past.

Appellee respectfully submits that the evidence in this case abundantly supports the factual determination of fair market value made by the Tax Commission. Not only is there substantial evidence supporting the factual determination of the fair market value, the evidence overwhelmingly supports the conclusion reached by the Tax Commission as to the fair market value of the property in question.

ARGUMENT

The proposition that in determining fair market value the tax assessing agency may look at the differing transactional costs of a category of taxpayers in selling property has been previously endorsed by this Court. In Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984), this court upheld the constitutionality of Utah Code Ann. § 59-5-4.5 which permitted a 20 percent reduction from comparable sales appraisal figures when valuing locally assessed property.

In so ruling, this court stated as follows:

"Since "market value" is not a term having a wholly fixed and precise meaning, it is reasonable and constitutionally permissible for the legislature to recognize that "transactions" can and do influence values computed on actual sales prices, as well as other valuation formula, to provide that they may be taken into account in determining market value. That conclusion is supported by the language in Article 13, Section 2 that gives the legislature some power to define value. (Since there is no claim in this case that the italics amount of the transaction cost provided for in Utah Code Ann. § 59-5-4.5 is factually arbitrary, the reasonableness of the amount of those costs is in effect conceded.)"

That analysis is correlative to the situation in this case. The county does not dispute the basic fact that a developer must experience a certain absorption period with attendant transactional costs. Further, they do not dispute the calculation or amounts of those costs. Rather, they simply claim that because the individual homeowner is not treated identically,

the Tax Commission may not employ a valuation methodology recognizing these facts in determining fair market value.

The evidence demonstrated that the developer experiences different economic pressures and transactional costs than does the individual homeowner. Those differences have been recognized, not only by the Utah Tax Commission, but by the Federal Home Loan Bank Board (Exhibit 4, Record p. 50) and by the Office of Thrift Supervision (Exhibit 5, Record p. 62-67). Moreover, these costs are so well documented that federal lending agencies and authorities have mandated their use by lenders in order to derive realistic fair market value for lands under development.

The proper way of determining fair market value is by reference to a real or hypothetical sale in bulk from one developer to another developer. (Exhibit 4, Record p. 50.) Those are the proper "willing seller" and "willing buyer." That second developer would require and adopt a valuation that would take into account an absorption period and appropriate discount rates. This is entirely consistent with both testimony of Mr. Layton and the provisions of Exhibit 4 adopted by the Federal Home Loan Bank. Moreover, such methodology recognizes the realities of the market place and, thus, leads to a true market value.

Appellant cites no Utah authority in support of their position. Rather, they cite cases from other jurisdictions, all of which were determined under the state law of those jurisdictions. In none of those cases is there indication that evidence as to the fundamental justification for the determination of fair market value on the part of authority was present such as is present in this case. In none of those cases did there appear to be evidence of the market and economic reality that justify the tax treatment requested by the taxpayer.

Finally, the rationale of Appellants in this case, and in the authority cited, is fundamentally inconsistent with this Court's analysis in Rio Algom Corp. supra.

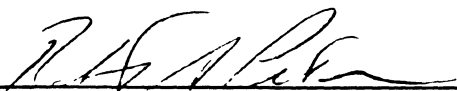
CONCLUSION

Appellee, Benchmark, Inc., respectfully submits that based upon the facts and governing legal authority, the ruling of the Utah Tax Commission should be upheld as being supported by substantial evidence and that Appellant be denied the relief it requests.

DATED this 15th day of November, 1991.

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By


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CERTIFICATE OF MAILING

I hereby certify that I caused four (4) true and correct copies of the within and foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, this 15th day of November, 1991, to the following:

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